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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Amador)

ROGER ROOT, Plaintiff and Appellant, v. DEUTSCHE BANK NATIONAL TRUST COMPANY et al., Defendants and Respondents.	C077140 (Super. Ct. No. 13CV8541)

In this postforeclosure action, plaintiff Roger Root appeals from the judgment of dismissal entered after the trial court sustained without leave to amend the demurrer to his latest pleading. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We recite only the underlying facts necessary to resolve this appeal. In June 2006, Root and his wife purchased a residential property located at 21400 Robin Lane, Pine

Grove, California 95665 (the property). They executed an adjustable rate promissory note (Note), secured by a deed of trust (DOT), on the property. The Note indicates that Root and his wife borrowed $280,000 from Long Beach Mortgage Company (LBMC). The DOT identifies them as the borrowers and LBMC as the lender, beneficiary, and trustee.[1]

In December 2007, Washington Mutual Bank (WaMu), as successor in interest to LBMC, substituted California Reconveyance Company (CRC) as the trustee. In September 2008, WaMu assigned the beneficial interest under the Note and the DOT to Deutsche Bank National Trust Company (Deutsche Bank), as trustee for the Long Beach Mortgage Loan Trust 2006-7 (Loan Trust). On that same day, a substitution of trustee was recorded, which, again, named CRC as the trustee.

Three weeks later, the Office of Thrift Supervision closed WaMu and appointed the Federal Deposit Insurance Corporation (FDIC) as the receiver of WaMu. On that same day, JPMorgan Chase Bank, N.A. (Chase) entered into a written agreement with the FDIC receiver to acquire substantially all of WaMu's assets and liabilities.

In November 2010, Chase, as successor in interest to WaMu, assigned the beneficial interest under the Note and the DOT to Deutsche Bank, as trustee for the Loan Trust. On the same day, a substitution of trustee was recorded, which, again, named CRC as the trustee. In March 2012, a corporate assignment of deed of trust was recorded, indicating that Chase assigned the DOT, "together with all right, title, and interest secured thereby," to Deutsche Bank, as trustee for the Loan Trust.

In July 2012, CRC recorded a notice of default, which indicated that Root and his wife were in arrears on their loan in the amount of $47,490.41. In early October 2012, a

[1] In November 2006, Root and his wife obtained a second loan in the amount of $43,000, secured by a second deed of trust.

Chase employee named Amber informed Root that he qualified and would receive a loan modification based on his oral representation that he was receiving new income from a trucking business. However, another Chase employee, Rebecca Martell, later clarified that Root needed to provide financial documentation verifying his new income in order to receive a loan modification. According to Root, Martell promised him that the foreclosure sale would not go forward while Chase was waiting for him to submit the financial documentation (including tax documents), which Martell understood would not be available until after January 1, 2013.

In late October 2012, CRC recorded a notice of trustee's sale and a sale was scheduled for November 16, 2012. In response to his inquiry, Martell told Root that the foreclosure sale would be postponed pending his submission of the requested financial documentation. After several postponements, the property was sold at a trustee's sale in April 2013. A trustee's deed upon sale was recorded less than a week later. Root never provided Chase the financial documents it requested.

In September 2013, Root filed an action against Deutsche Bank, as trustee for the Loan Trust, CRC, and Chase. Root alleged causes of action for wrongful foreclosure, quiet title, fraud and negligent misrepresentation, breach of the requirement to place him in the Home Affordable Mortgage Program (HAMP), and violation of California's unfair competition law (UCL), Business and Professions Code section 17200 et seq. After defendants demurred to the complaint but before the court issued a final ruling, Root filed a first amended complaint (FAC) alleging the same causes of action he alleged in the original complaint.

In March 2014, defendants demurred to the FAC. After hearing oral argument, the trial court sustained the demurrer without leave to amend.

Following entry of the judgment of dismissal, plaintiff filed a timely notice of appeal in July 2014. The appeal was dismissed in February 2016 for failure to file an

opening brief. Thereafter, the order of dismissal was vacated and briefing was completed in July 2016. The panel as presently constituted was assigned the matter in October 2018.

DISCUSSION

1.0 Standard of Review

We review an order sustaining a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law. (*McKell v. Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1469.) "[W]e accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law." (*Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919, 924.) We may also consider documents attached to the complaint and matters subject to judicial notice. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)

Although we review the complaint de novo, " '[t]he plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on which the trial court sustained the demurrer, and if the defendant negates any essential element, we will affirm the order sustaining the demurrer as to the cause of action. [Citation.] We will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings.' " (*Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1490-1491 (*Rossberg*).)

"If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude

that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) Such a showing can be made for the first time on appeal. (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

2.0 The Trial Court Properly Sustained the Demurrer Without Leave to Amend

2.1 *Wrongful Foreclosure*

Root's wrongful foreclosure cause of action is predicated on the theory that the assignment of his loan and the DOT to the Loan Trust was invalid because it occurred after the trust closed and violated the terms of the agreement governing the trust. According to Root, the Loan Trust is governed by a Pooling and Service Agreement (PSA) to which New York state law applies, and that an assignment to a securitized trust governed by New York law made after the trust's closing date and in violation of terms of the PSA is void. In support of his theory, Root relies on *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079, 1097 [finding that allegations of an assignment to a securitized trust which occurred after the closing date provided in a PSA were sufficient to state a basis for concluding the assignment was void under New York law].)

Root does not have standing to raise this claim. This court has declined to follow *Glaski.* Instead, we have concluded, consistent with the overwhelming majority of New York, California, and federal courts, that an assignment to a securitized trust made after the trust's closing date is merely voidable, and a borrower does not have standing to challenge alleged irregularities in the securitization of the loan. (See *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 42-43; *Mendoza v. JPMorgan Chase Bank, N.A.* (2016) 6 Cal.App.5th 802, 805, 812-817; see also *Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815, fn. 5). Accordingly, the trial court did not err in sustaining the demurrer to this cause of action.

2.2 *Quiet Title*

Root's quiet title cause of action fails because he did not allege compliance with the tender rule. A borrower cannot quiet title to secured property without alleging payment of the debt secured by the property. (*Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 86.)

We find no merit in Root's contention that he was excused from alleging tender because the trustee's sale was void. Root's argument is based on the same theory we rejected above. The tender requirement is excused only where: (1) the underlying debt is invalid; (2) the trustee's deed is void on its face; (3) there exists a counterclaim that is equal to or greater than the amount due; or (4) it would be inequitable to impose the condition on the particular party challenging the sale. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113.) Plaintiff does not allege facts demonstrating that any of these exceptions apply.

2.3 *Fraud and Negligent Misrepresentation*

Root's fraud and negligent misrepresentation cause of action is predicated on Chase's alleged misrepresentation that the trustee's sale would be postponed pending his submission of financial documents verifying that he qualified for a loan modification. In support of this claim, Root alleges that, after the notice of default was recorded, a Chase employee (Amber) told him he qualified for a loan modification based on his oral representation that he was making new income from a trucking business. Shortly thereafter, another Chase employee (Martell) told him that a foreclosure sale would not go forward while Chase was waiting for him to submit certain financial documents verifying his new income after January 1, 2013, and that he would receive a loan modification upon written confirmation of his new income. According to Root, Martell

specifically told him in January and February 2013[2] that the trustee's sale "would be continued to be postponed" while Chase was awaiting his submission of the financial documents. Because the trustee's sale was postponed several times (which was consistent with what he was verbally told each month by "the Chase representative"), and because he was told that the sale would be postponed "pending the modification that was promised upon confirmation of his income," he was "lulled" into believing that he would receive a loan modification and no trustee's sale would take place. Root maintains that he lost his property as a result of Chase's misrepresentations, which in turn led to "having to defend against a wrongful eviction lawsuit, attorney fees, legal costs, personal injuries, pain and suffering, anxiety, humiliation, fear, extreme emotional distress, and physical injuries."

" 'Promissory fraud' is a subspecies of the action for fraud and deceit." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*).) "The elements of promissory fraud . . . are: (1) a promise made regarding a material fact without any intention of performing it; (2) the existence of the intent not to perform at the time the promise was made; (3) intent to deceive or induce the promisee to enter into a transaction; (4) reasonable reliance by the promisee; (5) nonperformance by the party making the promise; and (6) resulting damage to the promise[e]." (*Behnke v. State Farm General Ins. Co*. (2011) 196 Cal.App.4th 1443, 1453.)

The elements of a claim for negligent misrepresentation are: (1) a misrepresentation, (2) made without reasonable grounds for believing it to be true, (3) with the intent to induce reliance on the misrepresentation, (4) actual and justifiable

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2 The FAC alleges that Root's conversations with Martell occurred in January and February *2012*. However, in view of the other allegations in the FAC, we will liberally construe the pleading as alleging that the conversations occurred in January and February *2013*.

reliance, and (5) resulting damage. (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166 (*Daniels*).)

Causes of action for fraud and negligent misrepresentation must be pleaded with specificity. (*Lazar*, *supra*, 12 Cal.4th at p. 645; see *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184; *Daniels*, *supra*, 246 Cal.App.4th at p. 1166.) This specificity requirement necessitates pleading facts which show how, when, where, to whom, and by what means the representations were tendered. A plaintiff's burden in asserting a fraud or negligent misrepresentation claim against a corporate employer is even greater. In such a case, the plaintiff must allege the names of the persons who made the representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. (*Lazar*, *supra*, at p. 645; *Daniels*, *supra*, at pp. 1166-1167.) "The specificity requirement serves two purposes: 'to apprise the defendant of the specific grounds for the charge and enable the court to determine whether there is any basis for the cause of action.' " (*Daniels*, at p. 1167.)

Root's allegations do not state a viable cause of action for promissory fraud or negligent misrepresentation. The FAC does not identify a specific person who unconditionally promised to modify Root's loan without the intention of performing at the time the promise was made. Indeed, the allegations in the FAC show that Root was advised by a Chase employee (Martell) that he would *not* receive a loan modification unless he submitted certain financial documents verifying his oral representation that he was receiving new income from a trucking business. It is undisputed that he never submitted the requested documents, even though he was given several months to do so, and he offers no explanation for his omission. Further, Root failed to allege specific facts showing that the Chase employees he spoke to had the authority to promise him a loan modification or postpone the foreclosure sale until he submitted the requested financial documentation. Moreover, because Chase's purported representations regarding a loan

modification and postponement of the foreclosure sale were as to future events, Root's negligent misrepresentation claim fails. "A representation generally is not actionable unless it is about 'past or existing facts.' [Citation.] Although a false promise to perform in the future can support an *intentional* misrepresentation claim, it does not support a claim for *negligent* misrepresentation." (*Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 458.)

Root also failed to allege facts showing how the alleged misrepresentations caused him harm. To assert fraud by misrepresentation, a plaintiff must " ' " ' "establish a complete causal relationship" between the alleged misrepresentations and the harm claimed to have resulted therefrom.' " [Citation.]' [Citation.] This requires a plaintiff to allege specific facts not only showing he or she actually and justifiably relied on the defendant's misrepresentations, but also how the actions he or she took in reliance on the defendant's misrepresentations caused the alleged damages. [Citation.] [¶] ' " ' "Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages." ' " [Citation.]' [Citation.] Indeed, ' " '[a]ssuming . . . a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to *unrelated causes*.' [Citation.]" [Citation.] If the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation *cannot* be alleged and a fraud cause of action cannot be sustained.' " (*Rossberg*, *supra*, 219 Cal.App.4th at p. 1499.)

The FAC does not adequately allege a nexus between Chase's alleged misrepresentations and Root's alleged economic harm. The risk of losing the property from foreclosure was the result of Root's default on his loan, not the conduct of any Chase employee. Root does not allege that his reliance on the promised loan modification caused him to default on his loan or prevented him from curing the existing default. (See *Rossberg*, *supra*, 219 Cal.App.4th at p. 1499 [borrowers failed to state a

fraud cause of action because they did "not allege their reliance on the promised loan modifications caused them to default on their loans or prevented them from curing their existing defaults"].) Nor does Root allege that his reliance on the promise to postpone the foreclosure sale prevented him from curing the existing default. (See *Majd v. Bank of America, N.A.* (2015) 243 Cal.App.4th 1293, 1308 ["[t]o the extent plaintiff was damaged, it was by the foreclosure sale itself, not by any representation about the sale being postponed"].) Root failed to allege any facts (or attach documents to the FAC) showing that he was making sufficient new income to qualify for a loan modification or how the alleged misrepresentations prevented him from submitting the requested financial documentation for a loan modification.

The allegations in the FAC suggest that, in reliance on Chase's alleged misrepresentations, Root was unable to pursue alternative avenues to avoid foreclosure, including filing a civil action or initiating chapter 13 bankruptcy proceedings. However, Root does not set forth how the alleged misrepresentations prevented him from pursuing these alternatives. Nor does he allege that these alternative avenues would have allowed him to avoid foreclosure. (See *Cornejo v. Ocwen Loan Servicing,* LLC (E.D.Cal. 2015) 151 F.Supp.3d 1102, 1115-1116 [to state a cause of action for fraud, borrowers "must 'allege facts showing that [their] reliance on [the alleged] statement caused the trustee's sale of [their] home' " and that actions allegedly not taken in reliance, including filing for bankruptcy or a civil action, "would have been successful in preventing the [foreclosure] sale"].)

For these reasons, we conclude Root's fraud and negligent misrepresentation cause of action fails. Because Root does not suggest how he might cure the defects by amendment, he has not shown the trial court abused its discretion in denying him leave to amend.

2.4 *Breach of HAMP Requirements*

Root's fourth cause of action, styled as "Breach of Requirement To Place Plaintiff in HAMP Program—Specific Performance thereof upon Rescission of Trustee's Deed," is predicated on the theory that Chase was required to modify his loan (or at least implement the HAMP loan modification process) because Chase accepted a loan modification application from him that met all the criteria and requirements of HAMP.[3] According to Root, he is entitled to specific performance of the HAMP program rights and damages.

"When financial markets nearly collapsed in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act of 2008 (Pub.L. No. 110–343 (Oct. 3, 2008) 122 Stat. 3765). [Citation.] The centerpiece of this act was the federal Troubled Asset Relief Program (TARP) which, in addition to providing a massive infusion of liquidation to the banking system, required the United States Department of the Treasury (hereafter, Treasury) to implement a plan to minimize home foreclosures." (*Bushell, supra*, 220 Cal.App.4th at p. 922.)

"That plan was HAMP, introduced in February 2009, and funded by a $50 billion set-aside of TARP monies to induce lenders to refinance mortgages to reduce monthly payments for struggling homeowners. [Citation.] Specifically, HAMP enables certain homeowners who are in default or at imminent risk of default to obtain 'permanent' loan modifications, by which their monthly mortgage payments are reduced to no more than 31 percent of their gross monthly income for a period of at least five years. Lenders

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[3] Pursuant to Evidence Code sections 452 and 459, defendants request we take judicial notice of HAMP Supplemental Directive No. 09-01, a regulation issued by the United States Department of Treasury in April 2009. We grant the request. This regulation "delineates HAMP's eligibility requirements and modification procedures. [Citation.] Lenders must perform HAMP loan modifications in accordance with Treasury regulations." (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 923 (*Bushell*).)

receive from the government a $1,000 incentive payment for each permanent HAMP modification, along with other incentives." (*Bushell, supra,* 220 Cal.App.4th at p. 923.)

Under HAMP, "[t]he participating lender initially determines whether a borrower satisfies certain threshold requirements regarding the amount of the loan balance, monthly payment, and owner occupancy. [Citation.] It then implements the HAMP modification process in two stages. [Citation.] In the first stage, it provides the borrower with a 'Trial Period Plan' (TPP), setting forth the trial payment terms, instructs the borrower to sign and return the TPP and other documents, and requests the first trial payment.[4] [Citation.] In the second stage, if the borrower has made all required trial payments and complied with all of the TPP's other terms, and if the borrower's representations on which the modification is based remain correct, the lender must offer the borrower a permanent loan modification." (*Rufini v. CitiMortgage, Inc.* (2014) 227 Cal.App.4th 299, 306, italics omitted.)

Several courts, including this court, have found that a borrower who has allegedly complied with the requirements of a written TPP may sue the lender under state contract law for failing or refusing to offer a permanent loan modification. (See, e.g., *Rufini v. CitiMortgage, Inc.*, *supra*, 227 Cal.App.4th at pp. 305-306; *Bushell, supra,* 220 Cal.App.4th at pp. 925-928; *West v. JPMorgan Chase Bank, N.A.* (2013)

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4 "[B]efore a lender offers a TPP to a distressed borrower, the lender (1) has already found that the borrower satisfies certain simple threshold requirements under HAMP regarding the basic nature of the loan obligation (e.g., a certain loan amount balance; property is primary residence; monthly mortgage payment greater than 31 percent of monthly gross income); (2) has already calculated a trial modification payment amount using a 'waterfall' method of specified steps that drops the borrower's monthly mortgage payment to the HAMP target figure of 31 percent of monthly gross income; and (3) most significantly from the lender's perspective, has already determined, pursuant to application of a net present value (NPV) test based in part on income/financial representations provided by the borrower, that it is more profitable to modify the loan under HAMP than to foreclose upon it." (*Bushell, supra*, 220 Cal.App.4th at p. 923.)

214 Cal.App.4th 780, 786; *Wigod v. Wells Fargo Bank, N.A.* (7th Cir. 2012) 673 F.3d 547, 560-561.)

Root's fourth cause of action fails as a matter of law. In support of this claim, Root alleges that "defendant was mandated to enter [him] into [a TPP] and then make it permanent upon completion of the trial period if [he] complied with the terms of [the TPP] . . . ." Root further alleges that "once defendant accepted [his loan] modification application under the HAMP . . . , . . . defendant was required to issue the modification" because he met "all the criteria and rules" for a HAMP loan modification. (Boldface omitted.) Root, however, did not attach his loan modification application to the FAC or allege any facts establishing that he qualified for a HAMP loan modification. Root acknowledges that he was never offered a TPP and does not dispute that he failed to provide Chase the requested financial documentation so that it could determine whether he qualified for a TPP. (*Bushell*, *supra*, 220 Cal.App.4th at p. 924, fn. 4 [after June 1, 2010, Treasury required lenders to fully verify a borrower's financial information before offering a TPP].) The FAC alleges no facts establishing a viable cause of action based on Chase's alleged violation of the HAMP requirements.

To the extent Root suggests that Chase's alleged oral promise to modify his loan is enforceable, we disagree. The promise lacks sufficiently definite terms to be enforceable. (See *Daniels*, *supra*, 246 Cal.App.4th at pp. 1173-1174 [alleged oral promise to grant loan modification if borrowers made timely temporary payments and submitted all required documentation too indefinite to be enforceable because borrowers failed to allege essential terms, such as the interest rate, finance charges, and length of repayment].)

2.5 *California Business and Professions Code Section 17200 et seq.*

To state a claim for a violation of the UCL, a plaintiff must allege the defendant committed a business act or practice that is "fraudulent, unlawful, or unfair." (*Levine v.*

Blue Shield of California (2010) 189 Cal.App.4th 1117, 1136.) Unfair competition can be established by showing a violation of any law. (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180.)

Root failed to allege a specific fraudulent, unlawful, or unfair business act or practice, apart from allegations as to which the demurrer was properly sustained. Liberally construed, the FAC remains devoid of allegations to state a viable cause of action for wrongful foreclosure, quiet title, fraud, negligent misrepresentation, or breach of HAMP requirements. Moreover, there are no allegations of a pattern of deceptive practices related to wrongful foreclosures. As a consequence, the trial court properly sustained the demurrer as to this cause of action. (See *Price v. Starbucks Corp.* (2011) 192 Cal.App.4th 1136, 1147 [because the underlying causes of action fail, the derivative UCL claim also fails]; *Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.)

2.6 *Leave to Amend*

Root has not shown that there is a reasonable probability he could cure the defects in the FAC given further opportunity to do so. Accordingly, the trial court did not abuse its discretion in sustaining the demurrer to the FAC without leave to amend. There is nothing in the record or in Root's appellate brief[5] showing he could add facts to his FAC that would support a viable cause of action.

[5] Root filed an opening brief but did not file a reply brief.

DISPOSITION

The judgment is affirmed. Defendants shall recover costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

BUTZ, Acting P. J.

We concur:

MURRAY, J.

HOCH, J.